ARBITRATION ADVISORY

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AVOIDING ARBITRATOR AND ADMINISTRATOR BIAS

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INTRODUCTION

Avoiding not only bias, but also the appearance of bias, is of vital importance to a successful fee arbitration program and to the success of an individual arbitration. The importance of avoiding bias is underscored by:

a) The attorney fee arbitration program is administered by attorneys and bar associations. That may itself cause people to suspect that a lawyer operated program is biased in favor of lawyers. Arbitration programs should be alert to the potential public relations disaster if conduct is perceived as being pro attorney.

b) Arbitration is a consensual procedure. In the context of fee arbitration, clients cannot be expected to elect fee arbitration, and lawyers cannot be expected to consent to binding arbitration or allow non-binding adverse decisions to stand, if they sense bias in the proceedings.

c) Under Code of Civil Procedure Section 1286.2 one of the very few reasons a binding arbitration award may be overturned is a finding of bias or the appearance of bias in an arbitrator.

d) Code of Civil Procedure Section 1286.2, as amended in 1993, provides that the grounds for disqualifying a judge under CCP § 170.1 are also grounds for is qualifying an arbitrator.

SUMMARY

Parties are entitled to a neutral, impartial forum. Arbitrators and parties, however, are drawn from the same larger community and there are many factors that can interfere with the appearance of impartiality. Administrators must be sensitive to the need to constantly screen for situations which could create an impression of bias.

Some situations will necessitate that the prospective arbitrator not be appointed. Other situations suggest that the facts be disclosed to the parties, with the parties having the option to request another arbitrator be appointed. Every effort should be made by administrators to either disqualify or disclose, as appropriate, as early as possible in the proceeding, particularly before either party can say that the arbitrator was "for" or "against" any party, and before the arbitrator feels unfairly accused of bias.

DISCUSSION

California's arbitration statute has long provided that a binding arbitration award shall be vacated if "(a) the award was procured by corruption, fraud or other undue means; (b) there was corruption in any of the arbitrators...." [CCP §1286.2].

Settled interpretation of the statute did not require a person seeking to upset an arbitration award to prove that, for example, the arbitrator received a bribe. To the contrary, California courts adopted the rule annunciated in Commonwealth Corp. v. Casualty Co. 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed. 2d 301 (1968) that arbitrators must "disclose to the parties any dealings that might create an impression of possible bias." No proof of actual corruption or fraud was required.

In Neaman v. Kaiser Foundation Hospital (1992) 9 Cal.App.4th 1170 [11 Cal.Rptr. 2d 879], the court vacated a binding arbitration award where the neutral arbitrator, a retired Superior Court judge, failed to disclose that on five prior occasions he had been hired by Kaiser Permanente as an arbitrator, when the record showed he had arbitrated numerous Kaiser matters, 65% of the time as the opposing party-appointed arbitrator, 30% as the neutral arbitrator, and only 5% of the time as Kaiser's appointed arbitrator. The judge's declaration stated he had advised both parties "in substance" regarding his prior service as an arbitrator in Kaiser matters. The court determined he had not "unambiguously" disclosed his prior experience as a party arbitrator and, on that basis, held that the retired judge's relationship with Kaiser "was a substantial business relationship, and should have been fully disclosed . . . ."

In brief summary, CCP § 170.1, which now applies to arbitrations, will prevent a person from serving as an arbitrator if the person:

a) has personal knowledge of disputed facts or is likely to be a witness,

b) served as a lawyer for one of the parties or practiced with one of the parties within the past two years, or

c) has a financial interest in a proceeding.

These specific disqualification factors are defined broadly in CCP § 170.1, which also provides for disqualification if the foregoing factors apply (a) to the arbitrator's or party's family, including in some instances relatives within the third degree or (b) to business associates such as partners, officers or directors. Section 170.1 also provides for disqualification if "a person aware of the facts might reasonably entertain doubt that the [arbitrator] would be able to be impartial." It has been the practice of many judges to apply broader recusal and disclosure standards in matters appearing before them than are required by statute.

Thus, the courts are ready to upset an arbitration award if there is the appearance that an arbitrator has had significant prior dealings with one of the parties, without the need to determine whether the arbitrator was biased or prejudiced or to otherwise weigh the likelihood of bias.

PROGRAM ISSUES

Arbitration administrators should disclose as early as possible in the proceeding, whenever a pending arbitration involves, either as a party or as counsel, an officer, trustee or employee of the sponsoring bar association, or their relatives or business associates. The administrator's focus should be on whether a member of public could reasonably believe that some part of the arbitration process could be influenced by the party or an attorney involved in the arbitration because of their relationship to the sponsoring association.

If a party to an arbitration or his or her attorney has a family, business or professional relationship with any officials of the sponsoring association or with any staff member of the association, the other party may well suspect, rightly or wrongly, that the outcome to the arbitration was influenced by the insider. The other party to the arbitration likely will have no idea of the internal relationships within the association and what efforts are made by the association to isolate the arbitration process or the particular arbitration.

For example, disclosure should be made that an attorney involved in the arbitration process is a member of the Board of Trustees of the association, even if the Board of Trustees routinely delegates administration of the arbitration program to a paid staff and a separate committee. Similarly, disclosure should be made that a party to an arbitration proceeding is related to a staff member of the association.

Where the relationship warrants, the association may wish to decline the arbitration and refer the parties to the State Bar. Where the relationship is less sensitive, it may be sufficient to disclose that relationship in advance to the parties, and further disclose the manner in which the related person is isolated from arbitrations generally or from this particular arbitration. That disclosure usually should suggest that the sponsoring association will recuse itself on the request of either party.

Assuming that statute and case law do not prohibit the association from conducting the arbitration, the question of whether the association should decline the arbitration, whether advance disclosure is sufficient or whether no disclosure is needed because of the remoteness of the relationship is a matter as to which administrators should use their most mature and careful judgment.

ARBITRATOR APPOINTMENT ISSUES

The Committee suggests the following procedures to minimize claims of bias and the resulting difficulties in the appointment of arbitrators:

a) As a matter of standard operating procedure, when a case is assigned, the assigning administrator should advise the arbitrator(s) of the names of all parties to the arbitration and of their attorneys, to the extent known to the administrator.[1] That should be followed up with questions such as: "Is there a present or past relationship, direct or indirect, with any of these people that could create any concern of bias or impartiality? Are there any other factors that could create a concern about your impartiality or which ought to be disclosed to the parties?"

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[1] This discussion assumes the appointment is made by telephone. Where the appointment is made by letter, the letter proposing the appointment should alert the appointee to the need to screen for bias and should refer to CCP § 170.1

b) If the arbitrator responds in the negative, that response should be noted on the administrator's assigning checklist. If the proposed arbitrator responds that he or she has had some prior contact with a party to the arbitration proceeding or there are other facts which cause concern, the arbitration administrator or chair should continue the inquiry and determine at least (a) whether the prior matter is concluded, (b) how long ago the prior matter was concluded, and (c) whether the prior matter ended in an unpleasant relationship between the proposed arbitrator and the person involved in the arbitration. Administrators may wish to cite the proposed arbitrator to CCP § 170.1 for specific rules.

c) If either the proposed arbitrator or the administrator believes a realistic concern of bias is likely, the proposed arbitrator should not be assigned to the case. On the other hand, disqualification should not be used as a means for forum shopping. Avoiding the problem in the first instance is always preferable to struggling with the issue of replacing an arbitrator who has started a matter or, even worse, upsetting an award. If the administrator is uncertain the administrator should consult the committee chair supervising the arbitration process.If it is the combined sense of the proposed arbitrator and the administrator that there is no factual basis for bias then, unless the prior relationship is both minimal and remote, the relationship should be disclosed concurrently with the letter notifying the parties of the appointment of the arbitrator, and the parties offered the opportunity to request the proposed arbitrator not be appointed.

POST APPOINTMENT ISSUES

While there may be no issue of bias at the time of appointment, that may change because a party changes attorneys, witnesses are disclosed prior to or at an arbitration, or lawyers move from firm to firm. Whenever such issues come to the attention of the arbitration administrator, the administrator should require immediate written notification to the parties. Administrators should be concerned with the need to avoid bias on the one hand, and improper efforts at "arbitrator shopping" or delay, on the other hand.

FORM OF DISCLOSURE

Disclosure should be made as early as possible in the proceeding, in writing, and transmitted simultaneously to all parties. Disclosure should point out the procedure for exercising a challenge and the applicable time limits. The disclosure should avoid giving the impression that there is any “penalty” for requesting appointment of another arbitrator if there is a concern of bias. A party who believes that he or she cannot obtain a fair hearing in the local program should be notified of their right to arbitration before the State Bar pursuant to Rule 11.0 of the Rules of Procedure for Fee Arbitrations by the State Bar of California.